

IN THE PASCUA YAQUI COURT OF APPEALS

<hr/>		)	Case No: CA-06-010
)	
PASCUA YAQUI TRIBE,)	
)	
Plaintiff/Appellant)	
)	
v.		)	OPINION
)	
ALMA SOTO,)	
)	
Defendant/Appellee)	
<hr/>)	

Appeal from a decision of the Pascua Yaqui Tribal Court, Docket Number CR-06-116, the Honorable Melvin R. Stoof presiding.

Yancy A. Jencsok, Esq., Office of the Prosecutor, Pascua Yaqui Tribe, Tucson, Arizona, for the Plaintiff/Appellant.

Nicholas A. Fontana, Esq., Office of the Public Defender, Pascua Yaqui Tribe, Tucson, Arizona, for the Defendant/Appellee.

Per curiam.

We decide three issues in this case: 1) Should we grant the motion to dismiss the appeal due to the Plaintiff/Appellant Tribe's (Tribe) failure to file a transcript within thirty days of filing its notice of appeal; or alternatively, due to the Tribe's failure to file the trial court record with this Court?; 2) Did the trial court err as a matter of law in ruling that the Tribe has an affirmative, statutory duty to disclose relevant documents and information to a criminal defendant within ten days of arraignment pursuant to 3 PYT R. Crim. P. 38 (Criminal Rule 38)?; and 3) Did the trial court abuse its discretion when it dismissed with prejudice the charges against Defendant/Appellee Alma Soto (Soto) due to the Tribe's failure to timely disclose documents and information?

Soto was arrested on January 27, 2006 and charged the next day with two counts of narcotics possession and three counts of possession of drug paraphernalia. Soto's

arraignment was held on February 7, 2006. The Public Defender filed with the trial court a notice of appearance on behalf of Soto and a request for disclosure on March 10, 2006. The parties do not list the documents and information that were covered by the disclosure request, but they are probably the items listed at 10 PYTC § 5.1 (current version at 3 PYT R. Crim. P. 38)(hereafter Criminal Rule 38). Criminal Rule 38 provides that no later than ten days after the arraignment, the prosecutor shall make available to the defendant the names and addresses of all witnesses the prosecutor intends to call, all statements of defendant, names and addresses of experts, a list of all papers, documents, and other tangible objects that the prosecutor intends to use at trial, a list of all prior convictions that the prosecutor will use at trial, and all material or information that tends to mitigate or negate the defendant's guilt. At the March 13, 2006 pretrial conference, the trial court determined that the Tribe was statutorily obligated to disclose by February 17, 2006, but nonetheless ordered the Tribe to respond to Soto's request for disclosure by March 17, 2006. The Tribe provided Soto with police reports on March 13, 2006 and filed notice of full disclosure on March 14, 2006. Soto filed notice of disclosure on March 16, 2006.

On March 23, 2006, Soto filed a motion to dismiss alleging that the Tribe had not timely met its statutory duty to disclose. On April 4, 2006, the trial court found that the Tribe had not timely met its affirmative, statutory duty under Criminal Rule 38 to provide Soto with all disclosable materials and information in its possession so that she may prepare her case. As a sanction for the Tribe's violation of Criminal Rule 38, the trial court dismissed the case with prejudice citing 10 PYTC § 5.5 (current version at 3 PYT R. Crim. P. 42)(hereafter Criminal Rule 42), which provides a non-exclusive list of sanctions for failing to comply with discovery rules.

The Tribe filed a notice of appeal on April 7, 2006, claiming that the trial court misinterpreted Criminal Rule 38 and the sanction of dismissal with prejudice under Criminal Rule 42 was overly harsh. On August 1, 2006, Soto filed a motion to dismiss the appeal on two grounds: 1) The Tribe failed to file a transcript; and 2) The Tribe failed in its

duty to make sure the trial court record was filed with this Court within thirty days of filing its notice of appeal. PYTRAP Rules 9 and 10 (current versions at 3 PYTC § 2-3-9 and 3 PYTC § 2-3-10)(hereafter PYTRAP Rule 9 and PYTRAP Rule 10). We address Soto's motion to dismiss the appeal first and then follow with a decision on the merits of the appeal.

I

A. Failure to file the transcript

Soto argues that the appeal should be dismissed because the Tribe did not file a transcript pursuant to PYTRAP Rule 9. Soto asserts that the Tribe has a duty to file a transcript within thirty days from the date it filed the notice of appeal, PYTRAP Rule 9(B)(4), and its failure to do so invites summary dismissal of the appeal, PYTRAP Rule 10(B). The Tribe argues that a complete transcript is not required in every appeal. Only "such parts of the proceedings necessary for inclusion in the record" are required, PYTRAP Rule 9(B)(1), and as no hearing was held in this case, no transcript is required.

The applicable appellate rule states as follows: "The appellant shall file the original transcript with the appellate court clerk and serve a copy on each party to the appeal no later than thirty (30) days from the date the notice of appeal is filed." PYTRAP Rule 9(B)(4). When interpreting court rules, if the language of the rule is plain and unambiguous, we will apply it as written. In this case, PYTRAP Rule 9(B)(4) uses the mandatory word "shall," thereby placing a duty on an appellant to file an original transcript with the appellate court clerk no later than thirty days after the notice of appeal is filed. The rule is plain and unambiguous so there is no need to resort to outside sources. The record shows that the notice of appeal was filed on April 7, 2006. Therefore, the Tribe had 30 days from April 7, 2006 or until May 6, 2006 to file the transcript so it could be included in the trial court record. No transcript was filed by the Tribe.

The Tribe, nonetheless, argues that a transcript is not required in every appeal and that

no transcript is required in this case because no hearing was held. Several provisions of PYTRAP Rule 9 decide this issue. As stated above, PYTRAP Rule 9(B)(4) imposes a duty on the Tribe to file a transcript, but the transcript need not be an entire transcript, as PYTRAP Rule 9(B)(1) allows for a partial transcript of those “parts of the proceedings” the appellant deems “necessary for inclusion in the record.” PYTRAP Rule 9(B)(2) also implicitly allows for a partial transcript stating that “unless the entire transcript is to be included, the appellant shall . . . file with the appellate court clerk a description of the parts of the transcript which he intends to include in the record . . . [and] if the appellant refuses to order such parts he shall, within five (5) days, notify the appellee in writing of such refusal.” PYTRAP Rule 9(B)(1) requires an appellant to order a transcript, “if any” part is necessary, within ten days of filing the notice of appeal and PYTRAP Rule 9(D) allows for an agreed statement in lieu of a transcript. Rule 9(B)(1) and Rule 9(D), when read together, provides the appellant an option not to file a transcript at all. A transcript may not be necessary in an appeal that presents a pure question of law. We also agree with the Tribe that a transcript may not be available where a hearing was not held.

Finally, PYTRAP Rule 9(B)(2) requires that the appellee receive written notice regarding the transcript – whether it is a notice to file the entire transcript; a notice to file a partial transcript; or a notice that no transcript will be filed. Notice gives the appellee an opportunity to respond or pursue other alternatives. If no transcript exists, it makes sense that the Tribe should give Soto notice so she can respond or request a narrative summary, if necessary, pursuant to PYTRAP Rule 9(C). In this case, because no hearing was held, the Tribe can be excused from its failure to file the transcript. Moreover, even if we were to agree that no transcript is needed, the Tribe must still ensure that the trial court record is timely filed with the appellate court.

B. Failure to file the record

Soto argues that the Tribe has the duty to make sure the record is timely filed, and if

the record is not timely filed, the chief justice may summarily dismiss the appeal. 3 PYTC § 2-3-9(a)(2), 3 PYTC § 2-3-10(b)(hereafter PYTRAP Rule 9(A)(2), PYTRAP Rule 10(B)). The Tribe counters that PYTRAP Rule 9 places the burden on the trial court clerk, and not an appellant, to prepare and transmit the record to the appellate court. In support the Tribe relies on PYTRAP Rule 9(A)(2), which states that the trial court clerk shall number the items in the record, prepare an index and “transmit the record with the index to the appellate court no later than thirty (30) days from the date the notice of appeal is filed.”

The trial court record is critical to the appellate process because the appellate court uses it to understand what occurred on the trial level. *Lamone v. Navajo Nation*, 3 Nav. R. 87 (1982)(citing 4 Am. Jur. 2d *Appeals and Error* §§ 399, 491). The question is who has responsibility for the timely filing of the record, the trial court clerk or the Tribe? We rely on two provisions in the appellate rules to hold that the Tribe, as the appellant, has the duty to make sure the trial court record is timely filed with the appellate court. PYTRAP Rule 9(A)(3) allows the “appellant [to] obtain an order from the appellate court that extends the time for transmission of the record.” This rule gives appellant control over the record because it gives the appellant authority to request an extension of time to file the record. The other rule is plain and unambiguous and orders the appellant to timely file the record: “*If the appellant fails to timely file the record*, the chief justice may summarily dismiss the appeal.” PYTRAP Rule 10(B)(emphasis added).

These two rules, PYTRAP 9(A)(3) and PYTRAP 10(B), make the appellant responsible for ensuring that the trial court record is timely filed with the appellate court. The rules place this duty on the appellant for several reasons. The appellant, as the party appealing, is in a better position to know about the progress of the appeal than the trial court clerk, who has many other cases to oversee. In addition, to place the burden on the trial court clerk would, not only overburden the clerk, but would create delays that could prove detrimental to the appellant’s appeal. The appellant, whose primary interest is a final decision, must maintain consistent contact with the trial court to make sure that the record is

being prepared for timely submission to the appellate court. Lastly, the appellant's interests in the appeal are significant because an appellate court can only rule on issues in the record. The appellant's interests in the appeal should be enough to burden the appellant with ensuring that appellate court receives the full record.

The Tribe's reliance on PYTRAP Rule 9(A)(2) is misguided. The rule states that the "trial court clerk shall number the items comprising the record . . . [and] transmit the record with the index to the appellate court." PYTRAP Rule 9(A)(2). Common sense holds that the trial court clerk is charged with transferring the record because the clerk is the custodian of the trial court record. The trial court clerk has access to the record and all the necessary information, including the names of the parties and their counsels, and the appellate court clerk, to make a smooth transfer possible. PYTRAP 9(A)(2) does not impose a duty on the trial court clerk to make sure the record is timely filed; that duty, as explained earlier, falls on the appellant. The Navajo Nation Supreme Court, in interpreting its Appellate Rule 9(b)(4), which is nearly identical to the Pascua Yaqui rule, also held that the appellant, and not the trial court clerk, bears the burden of ensuring that the trial court record (which includes the transcript) is timely filed with the supreme court. *Navajo Nation v. Hatathlie*, 7 Nav. R. 259, 260 (1997).

Under PYTRAP Rule 10(B), "If the appellant fails to timely file the record, the chief justice may summarily dismiss the appeal." Rule 10(B) is permissive because it states that the chief justice "may" dismiss, and not "shall" dismiss, the appeal. Likewise, PYTRAP Rule 3 states that "the appellate court may, upon motion for good cause shown, suspend the requirements or provisions of any of these rules in a particular case, and may order proceedings in accordance with its discretion. These rules shall be construed to do justice." Here, given the novelty and confusion surrounding the issue of filing the record, we find that a dismissal of the appeal on procedural grounds would not do justice. We further find that, instead of a dismissal, a clarification of the rules as we have done above would be more in line with doing justice. Accordingly, Soto's motion to dismiss the appeal is denied. Our

interpretations of the appellate rules at issue in this case will apply to all cases pending in the Pascua Yaqui courts on the day this opinion is filed.

II

A. Failure to file disclosure

Soto argues that the Tribe, as prosecutor, has an affirmative statutory duty to disclose all evidence in its possession regarding her case no later than ten days after her arraignment. Criminal Rule 38 (3 PYT R. Crim. P. Rule 38) states that “no later than ten (10) days after the arraignment, the prosecutor shall make *available* to the defendant for examination and reproduction the following material and information” (emphasis added). The rule provides a list of items that the prosecution must make “available” such as the names and addresses of any intended witnesses, a list of all papers and prior convictions that the prosecution intends to use, and all material that tends to mitigate or negate defendant’s guilt. *Id.* Soto insists that a plain reading of Criminal Rule 38 necessitates the conclusion that the Tribe must disclose all evidence listed in the rule by turning it over to her. The Tribe, on the other hand, argues that the rule does not require a prosecutor to turn over documents, but instead they need only make the evidence “available” (like an open file) for a defendant to inspect no later than ten days after the arraignment. The dispute centers on the words “shall make available.”

For background purposes, it is generally understood that there is no constitutional right for a defendant to be granted access to the prosecution’s evidence. *See Kanuck v. Meehan*, 165 Ariz. 282, 284, 798 P.2d 420, 422 (1990); *accord Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). In the absence of a statute or court rule to the contrary, a person accused of crime is not, as a matter of right, entitled to inspection or disclosure of evidence in the possession of the prosecution. 7 A.L.R. 3d. 8 § 3 (2006). Similarly, in Arizona, prior to the adoption of 16A A.R.S. Rule 15.1, the defendant had no right to disclosure, absent a statutory provision providing such a right. *Burke v. Superior Court of Pima County*, 3 Ariz.

App. 576, 577, 416 P.2d 997, 998 (1966). Thus, the requirement of disclosure by the prosecution is, by and large, statutory in nature requiring us to look to the language of Criminal Rule 38.

The Pascua Yaqui Tribal Court interpreted Criminal Rule 38 to mean “that the prosecutor has the affirmative duty to provide the defendant all information within the possession or control of the prosecutor to reasonably apprise the defendant of the charges filed against him or her,” so that the defendant may prepare a defense. Order of Dismissal and Exoneration of Bond (April 4, 2006). The trial court’s use of the words “affirmative duty to provide” could be taken to mean that the prosecutor has to do more than provide an open file. However, whether our interpretation of the trial court’s ruling is correct or not makes no difference because we are not bound by our trial courts’ interpretation of Pascua Yaqui statutes and court rules. We review questions of law using the de novo standard of review, which makes this Court the final arbiter on interpreting our statutes or rules.

Criminal Rule 38(A)(1)-(6) states that “the prosecutor shall make available to the defendant,” no later than ten days after the arraignment, items summarized here as the names and addresses of any intended witnesses, a list of all papers and prior convictions that the prosecution intends to use, and all material or information that would tend to mitigate or negate defendant’s guilt. More specifically, Criminal Rules 38(A)(4) and 38(A)(5) states that the prosecution must “make available,” “a list of all papers, documents, photographs or tangible objects” and “a list of all prior convictions” that the prosecutor intends to use. (emphasis added). Both rules require the prosecution to create a list which can be made available to the defendant.

Because clauses in a statute are to be “read in conjunction with each other and harmonized whenever possible,” we must interpret rule 38(A) in light of all its various subdivisions. *Groat v. Equity Am. Ins. Co.*, 180 Ariz. 342, 347, 884 P.2d 228, 233 (1994). Thus, while Criminal Rule 38(A) merely requires the prosecution to “make available” information in its possession, when read in conjunction with other provisions in the rule, it

becomes clear that the law requires the prosecution to do some affirmative act in excess of providing an open file (i.e., give a list to the defendant).

The prosecution should, at a minimum, write up a list of the items in its possession, mentioned in Criminal Rule 38, that it intends to use at trial and give the list to the defendant. This list should be provided to the defendant within ten days after arraignment. The prosecution is not required to go beyond providing a list by also handing over to the defendant tangible evidence for inspection within the initial ten days. The defendant, however, can use the list to request documents or seek an opportunity to inspect tangible evidence in the prosecution's possession. Following this reasoning, the Tribe should have, at a minimum, given Soto a list of materials in its possession that it intended to use at trial. Because the Tribe failed to do so, it violated Criminal Rule 38 and violated Soto's due process rights.

B. Dismissal with prejudice

The Tribe argues that even if it violated Criminal Rule 38 by not affirmatively disclosing evidence in its possession, the sanction of dismissal with prejudice is overly harsh. We use an abuse of discretion standard to review sanctions for failure to comply with discovery rules and we give deference to the trial court's findings because of its superior ability to determine the facts of the case. Under this standard, we may reverse a discretionary decision if it rests on a clearly erroneous fact. In addition, as stated above, we review the trial court's findings of law de novo.

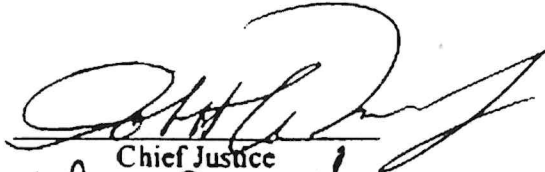
In this case, we give deference to the trial court's determination of the degree to which the Tribe's failure to follow discovery rules prejudiced Soto. The trial judge always has the option to throw out evidence that was not properly disclosed by the Tribe if it prejudices the defendant instead of dismissing the entire case. Criminal Rule 42(D). However, when there is a violation of a defendant's due process rights, it will be difficult to find an abuse of discretion on the part of the trial judge. If Soto's due process rights were not implicated by

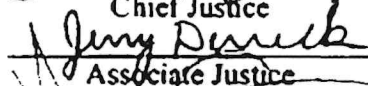
the Tribe's failure to disclose within the ten-day time limit, there would be little reason to dismiss the case with prejudice.

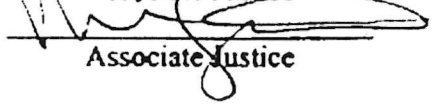
Due process is a fundamental right that is protected by the Pascua Yaqui Tribal Constitution and the Indian Civil Rights Act (ICRA). 25 U.S.C. § 1302(8) (2006). In fact, the trial court stated that "one of the fundamental rights of due process is the defendant's right to disclosure of all material evidence that may be used against him or her." Order of Dismissal and Exoneration of Bond at 2. The decision also stated that "due process rights must be afforded to defendants so that they may adequately defend their rights." *Id.* Unless the prosecution properly discloses evidence against a defendant, a defendant would have a difficult time preparing for trial. In addition, the ICRA states that a defendant must "be informed of the nature and cause of the accusation" and "be confronted with the witnesses against" her. 25 U.S.C. § 1302(6). By failing to provide Soto with the disclosure listed in Criminal Rule 38, including a list of the witnesses that the Tribe planned to use against her, the Tribe clearly violated Soto's due process rights and severely prejudiced her ability to prepare an adequate defense to the charges brought against her.

Criminal Rule 42 provides that if "a party has failed to comply with any provisions of these discovery rules . . . the court may impose any sanction which it finds just under the circumstances[.]" The rule goes on to provide a non-exclusive list of potential sanctions including ordering discovery, granting continuance, and declaring a mistrial. The list is non-exclusive and the rule grants the trial court much discretion to impose any sanction that it finds just. The trial court is in a better position to determine the prejudice to Soto for the Tribe's failure to disclose evidence and whether the Tribe was acting in good faith or not. Thus, while the sanction of dismissal with prejudice is strict, it does not rise to the level of an abuse of discretion. We affirm the trial court's decision to dismiss with prejudice the criminal charges against Soto.

Filed this 9 day of March, 2007.



Chief Justice


Associate Justice


Associate Justice

Pascua Yaqui Tribe
Office of the Prosecutor
7474 S. Camino de Oeste
Tucson, AZ 85746
(520) 879-6251

Yancy A. Jencsok
Deputy Prosecutor

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IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,	)	Trial Court case number: CR-06-116
)	
Plaintiff/Appellant,	)	Appeals Court case number: CA-06-011
)	
vs.	)	RESPONSE TO
	)	DEFENDANT/APPELLEE'S
Soto, Alma,	)	MOTION TO DISMISS
)	
Defendant/Appellee,)	
_____)	

Plaintiff/Appellant (“Appellant”), through counsel, hereby responds to Defendant/Appellee’s (“Appellee”) Motion to Dismiss Appeal as follows:

ARGUMENT

- A. The time limit for filing an opening brief begins running upon the transmission of the record to the appellate court.

Appellee indicates in the statement of facts of her motion that Appellant’s opening brief was filed “seventy-seven (77) days after filing the Notice of Appeal.” Appellee seems to be implying that Appellant should have filed the opening brief sooner. In point of fact, the deadline for filing an opening brief is triggered by the mailing of a notice by the appellate court clerk that the record was filed. PYTRAP Rules 10(A) and 12(A). Upon mailing of such a notice, an appellant has thirty days to file and opening brief. Rule 12(A). Appellee has not received any notice from the appellate court clerk.

- B. It is not an appellant's burden to insure that the record on appeal is transmitted to the appellate court.

The Appellee has argued that it is the duty of the Appellant to prepare and transmit the record on appeal. This argument is not supported by the wording of the Appellate Rules, nor is it supported by logic.

PYTRAP Rule 10(B) states that “[i]f the appellant fails to timely file the record, the chief justice may summarily dismiss the appeal.” However, as discussed below, other portions of the Rules place the burden of preparing and transmitting the record squarely upon the shoulders of the trial court clerk.

PYTRAP Rule 9(A) is titled “Composition of Record on Appeal; Transmission of Record.” It discusses in detail the record on appeal. Section (A)(1) describes what makes up the record. The record is “the original papers, exhibits, and other objects filed with the trial court clerk, a reporter’s transcript, transcription of an electronic recording or narrative or agreed statement, and copies of all entries.” Section (A)(2) directs how the record shall be prepared. In a relatively short section comprising 73 words, the phrase “the trial court clerk shall” is used three times. The trial court clerk shall number the items comprising the record. The trial court clerk shall transmit the record. The trial court clerk shall serve the index. All of these are duties given to the trial court clerk. Nowhere in Section (A)(2), nor anywhere else in Section (A) does it state that “the appellant shall.” Section (A)(3) does give the appellant *permission* to motion for an extension of time. But there is no accompanying duty or responsibility mentioned, and again, there is no mandatory language used anywhere in Section (A) in reference to the appellant.

In addition to the explicit language of Rule 9(A), logic indicates that the trial court clerk should be the one to prepare and transmit the record. The trial court clerk has possession of all the elements of the record, most importantly the original pleadings and the exhibits. The trial court clerk is the one most likely to have a complete record of the proceedings. Other jurisdictions commonly require the trial court clerk to prepare and transmit the record when there is an appeal.¹

¹ See for example Arizona Rules of Criminal Procedure, Rule 31.9 and Arizona Rules of Civil Procedure, Rule 11.

C. Ordering a transcript is not mandatory.

Appellee argues in her motion that an appellant must order a transcript. That is simply wrong. Rule 9(B) addresses the transcript. It does not require the ordering of a transcript in all appeals. Rather, it simply requires that a transcript “of such parts of the proceedings necessary for inclusion of the record” be ordered by the appellant. In this case, Appellant made the decision that no part of the proceedings needed to be transcribed. This case did not reach the stage of trial. It was dismissed at the time originally scheduled for a pretrial hearing. There was never any testimony taken or evidence submitted. The issues leading to the dismissal were thoroughly briefed, and the trial court judge issued a detailed order explaining his decision. In Appellant’s judgment, no transcript is necessary. If Appellee thinks that some, or all, of the proceedings should be transcribed, there is a procedure set forth in the rules allowing an appellee to request that some, or all, of the proceedings be transcribed. Those procedures are found at Rule 9(B)(2)(i) and (ii).

CONCLUSION

It is true that Rule 10(B) is inconsistent with Rule 9(A) as to who has the duty to file a record on appeal. However, these two rules should not be given equal weight. Rule 10(B) provides for a discretionary punishment when an appellant fails to timely file a record, but it does not state that an appellant actually has such a duty. Rule 9(A) on the other hand, has very explicit language regarding the record and indicating that it is the trial court clerk’s duty to prepare and file the record.

Rule 9(B) requires a transcript only when necessary. In this case, a transcript is not necessary.

These appellate rules are new and have not yet been interpreted by this court. If the court wishes Appellant to prepare and file the record and order a transcript, Appellant will certainly do so. But to dismiss the appeal is not an appropriate remedy under the circumstances.

WHEREFORE, Appellee’s motion should be denied.

DATED this 16th day of August, 2006.

MICAH SCHMIT
CHIEF PROSECUTOR



YANCY A. JENCOK
Deputy Prosecutor
Counsel for Appellant

Original delivered to:

Clerk, Pascua Yaqui Tribe Court of Appeals

Copy mailed/delivered to:

Pascua Yaqui Public Defender

On August 16, 2006 by:  _____

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

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PASCUA YAQUI TRIBE,)	Trial Court case number: CR-06-116
)	
Plaintiff/Appellant,)	Appeals Court case number: CA-06-011
)	
vs.	)	NOTICE THAT NO REPLY BRIEF
	)	WILL BE FILED
Soto, Alma,)	
)	
Defendant/Appellee,)	
_____)	

NOTICE IS HEREBY GIVEN that the Appellant will not file a Reply Brief.
Pursuant to PYTRAP Rule 12, the appeal should now be deemed at issue.

DATED this 11th day of August, 2006.

MICAH SCHMIT
CHIEF PROSECUTOR



NANCY A. JENCOK
Deputy Prosecutor
Counsel for Appellant

Original of foregoing and 5 copies delivered to:
Clerk, Pascua Yaqui Tribe Court of Appeals

Copy mailed/delivered to:
Pascua Yaqui Public Defender

On August 11, 2006 by: 

Nicholas A. Fontana
State Bar No. 014429
OFFICE OF THE PUBLIC DEFENDER
7474 South Camino de Oeste
Tucson, AZ 85757

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Attorney for Appellee

IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION


PASCUA YAQUI TRIBE,	)	APPELLATE CASE NO. CA-06-010
)	
Appellant,	)	PASCUA YAQUI TRIBAL COURT NO.:
	)	CR-06-116
vs.)	
	)	PYTRAP 10 MOTION TO DISMISS
ALMA SOTO,	)	APPEAL
)	
Appellee.)	

Comes now Appellee Alma Soto, through counsel, and respectfully moves the Chief Justice of the Pascua Yaqui Court of Appeals to enter an order dismissing the appealing due to the Appellant's failure to comply with Rule 9, Title 3, Pascua Yaqui Judicial Titles and Codes (Revised).

The grounds for this motion are set forth in the accompanying Memorandum of Points and Authorities.

DATED this 12th day of August, 2006.

PASCUA YAQUI PUBLIC DEFENDER


Nicholas A. Fontana
Chief Public Defender

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. FACTS.

3 On April 7, 2006, Appellant filed a timely Notice of Appeal appealing the order of dismissal
4 entered by the trial court on April 4, 2006. On June 23, 2006, seventy-seven (77) days after filing the
5 Notice of Appeal, the Appellant filed its Opening Brief.

6 The Appellant has not filed or served a transcript, agreed statement in lieu of transcript, or
7 requested additional time for the purpose of providing the Court of Appeals with record on appeal.
8 As result, there is no record on appeal for the Court of Appeals to review. The Appellant failed to
9 comply with any of the provisions of Rule 9, Title 3, Pascua Yaqui Judicial Titles and Codes.

10 II. RULE 10, TITLE 3, PASCUA YAQUI JUDICIAL TITLES AND CODES, REQUIRES
11 THE DISMISSAL OF THE APPEAL.

12 After a notice of appeal is filed, the trial court clerk has thirty (30) days to prepare, index,
13 transmit the record on appeal to the Court of Appeals, and serve a copy of the index to all parties to
14 the appeal. PYTRAP 9(A)(2). The burden of perfecting the record on appeal falls to the appellant.
15 If the appellant requires additional time, the appellant may obtain an extension of time for
16 transmission of the record. PYTRAP 9(A)(3). However, the motion for an extension of time must
17 be made before the expiration of the time for transmittal. *Id.*

18 An appellant has ten (10) days to order a transcript for inclusion in the record on appeal.
19 PYTRAP 9(B). The appellant must file the original transcript with the appellate court clerk and
20 serve a copy on each party to the appeal no later than thirty (30) days from the date the notice of
21 appeal is filed. PYTRAP 9(B)(4). If the appellant fails to timely file the record, the chief justice of
22 the Pascua Yaqui Court of Appeals may summarily dismiss the appeal. PYTRAP 10(B).

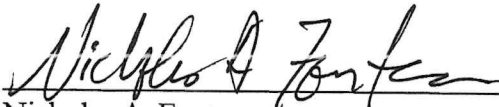
23 The Appellant has failed to comply with a single provision of Rule 9, Pascua Yaqui Tribe
24 Rules of Appellate Procedure. There is no record or transcript. At no time did the Appellant
25 request an extension from the Court of Appeals for transmittal of the record. The Appellant has

1 utterly failed to comply with its obligation to secure a record on appeal for the Court of Appeal's
2 consideration.

3 WHEREFORE Appellee Alma Soto respectfully moves the Honorable Chief Justice Robert
4 Williams to enter an order dismissing the Appellant's appeal.

5 DATED this 1st day of August, 2006.

6 PASCUA YAQUI PUBLIC DEFENDER

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9 _____
10 Nicholas A. Fontana
11 Chief Public Defender
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CERTIFICATE OF SERVICE

ORIGINAL and five (5) copies of the foregoing delivered this 1st day of August, 2006, to:

Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 S. Camino de Oeste
Tucson, AZ 85757

COPY of the foregoing delivered this 1st day of August, 2006, to:

Micah Schmit
Chief Prosecutor
Office of the Prosecutor for the Pascua Yaqui Tribe
7474 S. Camino de Oeste
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BY: 
Nicholas A. Fontana
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JUL 28 AM 10:13
CASE NO. CA 06-010
RM

Attorney for Appellee

IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,

Appellant,

vs.

ALMA SOTO,


Appellee.

) APPELLATE CASE NO. CA-06-010
)
) PASCUA YAQUI TRIBAL COURT NO.:
) CR-06-116
)
) **NOTICE OF ERRATA**

Comes now counsel for the Appellee to give the Court and the Appellant notice that the appellate case number on the Appellee's Brief in Response, filed on July 27, 2006, is incorrect. The correct appellate case number is CA-06-010. Counsel respectfully moves to amend the Brief in Response to reflect the correct case number.

DATED this 28th day of July, 2006.

PASCUA YAQUI PUBLIC DEFENDER


Nicholas A. Fontana
Chief Public Defender

CERTIFICATE OF SERVICE

ORIGINAL and five (5) copies of the foregoing delivered this 28th day of July, 2006, to:

Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 S. Camino de Oeste
Tucson, AZ 85757

COPY of the foregoing delivered this 28th day of July, 2006, to:

Micah Schmit
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Jessica Vega
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STATEMENT OF FACTS¹

Appellee Alma Soto was arrested at her home by an officer of the Pascua Yaqui Law Enforcement on January 27, 2006. On January 28, 2006, the Appellant filed a criminal complaint in the Pascua Yaqui Tribal Court charging the Appellee with two counts of possession of narcotics and dangerous drugs and three counts of possession of drug paraphernalia. [Criminal Complaint, CR-06-116, filed 1/28/06].

The Appellee appeared before the Pascua Yaqui Tribal Court for her Initial Hearing on January 28, 2006. [Initial Hearing Order, CR-06-116, filed 1/28/06]. The Appellee was in custody and without legal counsel. [Id.]. Her Arraignment was scheduled for February 7, 2006. [Id.]

The Appellee appeared for her arraignment on February 7, 2006, out of custody, but again without counsel. [Arraignment Order, CR-06-116, filed 2/7/06]. She entered a plea of not guilty to all charges and the matter was set for a Pretrial Conference on March 13, 2006.

On March 10, 2006, the Pascua Yaqui Public Defender entered a Notice of Appearance on behalf of the Appellee. [Notice of Appearance, CR-06-116, filed 3/10/06]. At the same time, counsel for the Appellee filed a Request for Disclosure. [Request for Disclosure, CR-06-116, filed 3/10/06].

At the Pretrial Conference on March 13, 2006, counsel for the Appellee moved to continue the Pretrial Conference to afford the Appellee an opportunity to obtain disclosure from the Appellant. [Order Continuing Pre-Trial, CR-06-116, filed 3/13/06]. The trial court granted the motion and re-set the Pretrial Conference for April 4, 2006. During the Pretrial Conference, counsel for the Appellee requested that the Court consider the Appellant's failure to provide

¹ The Appellee's Statement of Facts is limited to information contained in the pleadings and orders of the lower court. It appears that the Appellant has failed to file a transcript or narrative statement of evidence as required by Rule 9, Pascua Yaqui Tribe Rules of Appellate Procedure. As a result, notice has not been filed or served as required by Rule 10, Pascua Yaqui Tribe Rules of Appellate Procedure.

disclosure. [Minute Order, CR-06-116, filed 3/13/06]. The trial court noted that the Pascua Yaqui Code of Criminal Procedure requires the Tribe to produce disclosure within ten days of the arraignment, and that the Appellant was statutorily obligated to submit disclosure by February 17, 2006. [Id.]. The trial court ordered the Appellant to file a response to the Appellee's Request of Disclosure no later than March 17, 2006. [Id.].

The Appellant filed a Response to Disclosure & Tribe's Notice of Witness and Supplemental Disclosure on March 14, 2006. [Response to Disclosure & Tribe's Notice of Witness and Supplemental Disclosure, CR-06-116, filed 3/14/06]. The Appellee filed her Notice of Defenses and Disclosure on March 16, 2006. [Defendant's Notice of Defenses and Disclosure, CR-06-116, filed 3/16/06].

On March 23, 2006, the Appellee filed a Motion to Dismiss based on the Appellant's violation of Article 1, §§ 1(f) and (g) of the Pascua Yaqui Tribal Constitution, Rules 500, 503, and 504, Title 9, Chapter 2 of the Pascua Yaqui Judicial Titles and Codes (Revised), and *Brady v. Maryland*, 373 U.S. 83 (1963).

On March 24, 2006, the trial court issued an order directing the Appellant to file its response to the Appellee's Motion to Dismiss by April 3, 2006, and setting the matter for a hearing on April 4, 2006. [Minute Order and Order Setting Hearing on Defendant's Motion to Dismiss, CR-06-116, filed 3/24/06].

The Appellant did not file a response to the Appellant's Motion to Dismiss as ordered by the trial court. At the conclusion of the hearing on the Defendant's Motion to Dismiss, the trial court entered an order finding that the Appellant had failed to comply with the Pascua Yaqui Rules of Criminal Procedure, that the Appellant's failure to comply with the rules violated the Appellee's right to due process of law, and entered an order dismissing the charges against the Appellee with prejudice. [Order of Dismissal and Exoneration of Bond, CR-06-116, filed 4/4/06].

The Appellant filed a timely Notice of Appeal on April 7, 2006. [Notice of Appeal, CA-06-011, filed 4/7/06]. After filing the Notice of Appeal, it appears that the Appellant made no effort to comply with the provisions of Rule 9, Pascua Yaqui Tribe Rules of Appellate Procedure (hereinafter "PTYRAP 9"). As a result, the Clerk of the Court of Appeals has not filed a notice of record as required by Rule 10, Pascua Yaqui Tribe Rules of Appellate Procedure.

Despite the absence of a record, the Appellant filed its Opening Brief on June 23, 2006. [Appellant's Opening Brief, CA-06-011]. A copy of the Opening Brief was served on counsel for the Appellee on June 27, 2006.

STATEMENT OF ISSUES

1. Whether the trial court erred in finding that the Appellant's failure to provide disclosure within ten days of the Appellee's was violation Rule 500, Title 9, Pascua Yaqui Judicial Titles and Codes, (Revised).
2. Whether the trial court erred in finding that the Appellant's failure to provide disclosure in a timely matter violated the Appellee's due process rights as guaranteed by the due process clauses of the Indian Civil Rights, 25 U.S.C. § 1302, *et seq.*, and Article 1, § 1(h) of the Constitution of the Pascua Yaqui Tribe.
3. Whether the trial court erred in dismissing the charges against the Appellee with prejudice, pursuant to Rule 504, Title 9, Pascua Yaqui Judicial Titles and Codes (Revised).

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT THE APPELLANT VIOLATED RULE 500, TITLE 9, PASCUA YAQUI JUDICIAL TITLES AND CODES (REVISED).

A. Standard of Review.

The Pascua Yaqui Constitution and Pascua Yaqui Judicial Titles and Codes are silent regarding the standards of review to be applied by the Pascua Yaqui Court of Appeals. In other tribal jurisdictions, appellate courts give great deference to the factual determinations of trial courts because of the trial court's ability to observe the demeanor and evaluate the credibility of witnesses. *Coin v. Mowa*, No. AP-005-95 (Hopi 3/23/1997), 1997.NAHT.0000006 at ¶ 37 <http://www.tribalresourcecenter.org>; *United States v. Robinson*, 94 F.3d 1325, 1327 (9th Cir. 1996) (findings of fact reviewed for clear error). Questions of law are generally subject to de novo review on appeal. *Coin, supra*, at ¶ 39; *United States v. Sanchez-Lopez*, 879 F.2d 541, 550 (9th Cir. 1989).

B. The Record Reveals that the Appellant Failed to File a Disclosure Statement or Provide the Appellee with Disclosure within 10 Days of the Appellee's Arraignment as Required by Rule 500, Title 9, Pascua Yaqui Judicial Titles and Codes (Revised).

The Appellant filed the Criminal Complaint and Probable Cause Affidavit on January 28, 2006. Between the filing of the complaint and March 14, 2006, the Appellant did not file a single document with the trial court. The Appellant filed its response to the Appellant's Request for Disclosure only after being ordered to do so by the trial court. [Minute Order, CR-06-116, filed 3/13/06]. The Appellant also failed to file a response to the Appellee's Motion to Dismiss, a violation of the trial court's order of March 24, 2006. [Minute Order and Order Setting Hearing on Defendant's Motion to Dismiss, CR-06-116, filed 3/24/06].

C. The Trial Court Correctly Held that the Appellant Failed to Comply with Rule 500, Title 9, Pascua Yaqui Judicial Titles and Codes (Revised).

Rule 500(A), Title 9, Pascua Yaqui Judicial Titles and Codes (Revised), provides that:

No later than ten (10) days after the arraignment, the prosecutor shall make available to the defendant for examination and reproduction the following material and information within the prosecutor's possession or control:

- (1) The names and addresses of all persons whom the prosecutor will call as witnesses in the case-in-chief together with their relevant written or recorded statements;
- (2) All statements of the defendant and of any person who will be tried with the defendant;
- (3) The names and addresses of experts who have personally examined a defendant or any evidence in that particular case, together with the results of physical examinations and of scientific tests, experiments or comparisons, including all written reports or statements made by them in connection with a particular case;
- (4) A list of all papers, documents, photographs or tangible objects which the prosecutor will use at trial or which were obtained from or purportedly belong to the defendant;
- (5) A list of all prior convictions of the defendant which the prosecutor will use to prove motive, intent, or knowledge or otherwise use at trial;
- (6) All material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce his or her punishment therefore, including all prior felony convictions of witnesses whom the prosecutor expects to call at trial.

Rule 500 is intended to provide for the just determination of criminal proceedings.

Rule 101, Title 9, Pascua Yaqui Judicial Titles and Codes (Revised). It must be construed not only to preserve the public welfare, but to secure fairness in administration and the protection of the fundamental rights of the accused. *Id.* As a general rule, if the language of a statute is unambiguous, the plain meaning controls. *Robinson, supra*, 94 F.3d at 1328.

There is nothing ambiguous about Rule 500. It is more than a suggestion or recommendation. As the trial court correctly held, "[t]he intent of the disclosure law is clear, that *the prosecutor has the affirmative duty* to provide the defendant all information . . . [t]he rules of discovery and disclosure are designed to prevent trials by ambush, because courts in their

decisions affecting persons' liberties in criminal cases should be able to decide cases based on what facts are revealed rather than on what facts are concealed." [Order of Dismissal and Exoneration of Bond, at 2, emphasis added].

The Appellant failed to file a disclosure statement or provide the Appellee with disclosure until ordered to do so by the trial court. The Appellant did not provide the Appellee with disclosure until March 14, 2006, 34 days after the Appellee's arraignment and 24 days after the mandatory disclosure provisions contained in Rule 500(A).

The Appellant's failure to comply with Rule 500(A) is especially disturbing in this case. The Appellee was without the benefit of counsel until March 10, 2006. As noted by the American Bar Association:

[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice.

Comment, Rule 3.8, Model Rules of Professional Conduct. In dealing with a defendant in a criminal prosecution who is not represented by counsel, the prosecutor must be held to the strictest compliance with the procedural rules used to protect the constitutional and statutory rights of the accused. It is fair to ask whether the Appellant would have ever made any attempt to comply with Rule 500(A) if the Appellee were unable to obtain legal representation.

II. THE TRIAL COURT PROPERLY HELD THAT THE APPELLANT'S FAILURE TO PROVIDE DISCLOSURE IN A TIMELY MATTER VIOLATED THE DUE PROCESS CLAUSES OF THE INDIAN CIVIL RIGHTS ACT, 25 U.S.C. § 1302, *ET SEQ.*, AND ARTICLE 1, § 1(H) OF THE CONSTITUTION OF THE PASCUA YAQUI TRIBE.

In the order dismissing the charges against the Appellee due to the Appellant's failure to provide disclosure in a timely manner, the trial court recognized that although the provisions of the United States Constitution do not apply to tribes, the provisions of the Indian Civil Rights Act and Pascua Yaqui Code guarantee defendants in tribal courts the

right to due process of law. [Order of Dismissal and Exoneration of Bond, CR-06-116, filed 4/4/06, at 2]. In ordering the dismissal of the charges, the trial court was guided by the principles set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the United States Supreme Court held that the government's failure to provide exculpatory information or material related to a defendant's guilt or punishment upon request, resulted in the denial of a defendant's fundamental right to due process of law irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87.

As the trial court observed, the discovery and disclosure provisions of the Pascua Yaqui Rules of Criminal Procedure are intended to protect the accused's fundamental right to due process as it pertains to obtaining evidence from the prosecution. [Order of Dismissal and Exoneration of Bond, at 2]. The violation of Rule 500(A) constitutes a *per se* violation of the Appellant's fundamental right to due process of law.

III. THE TRIAL COURT'S DISMISSAL OF THE CHARGES WITH PREJUDICE AS A SANCTION FOR THE APPELLANT'S FAILURE TO COMPLY WITH RULE 500, TITLE 9, PASCUA YAQUI JUDICIAL TITLES AND CODES (REVISED), WAS PROPER UNDER RULE 504, TITLE 9, PASCUA YAQUI JUDICIAL TITLES AND CODES (REVISED).

The Pascua Yaqui Court has inherent and statutory authority to issue and enforce orders, and to devise rules of procedure. Article VIII, § 1, Constitution of the Pascua Yaqui Tribe; Title 1, Pascua Yaqui Judicial Titles and Codes, § 1.21, Rule 504, Title 9, Pascua Yaqui Judicial Titles and Codes (Revised).

Rule 504, Title 9, Pascua Yaqui Judicial Titles and Codes (Revised) states:

[i]f at any time during the course of a proceeding, it is brought to the attention of the court that a party has failed to comply with any provisions of these discovery rules or any order issued pursuant thereto, the court may impose any sanction which it finds just under the circumstances, including, but not limited to:

- (1) Ordering disclosure of the information not previously disclosed;

- (2) Granting a continuance;
- (3) Holding a witness, party, or counsel in contempt of court;
- (4) Precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; and
- (5) Declaring a mistrial when necessary to prevent a miscarriage of justice.

(emphasis added). The Pascua Yaqui Court is obligated “to compel obedience to its judgments, orders, and process, and to the orders of a judge of the Court, in an action or proceeding pending therein.” Title 1, Pascua Yaqui Judicial Titles and Codes, § 1.21(d).

There is no question that the Appellant failed in its duty to provide a disclosure within ten days of the Appellee’s arraignment. The Appellant failed to file a disclosure statement until ordered to do so by the trial court. Given the fact that the Appellant was not represented during the period of time when the Appellant should have provided disclosure, any sanction other than dismissal would have not only made a mockery of Rule 500, but would reward, rather than sanction, the Appellant for its failure to comply with the law. If the lower court’s order is not affirmed, not only will the Appellant be free to continue to disregard the rules of procedure, the Pascua Yaqui Court will be deprived of the power to enforce its orders and ensure compliance with its rules.

CONCLUSION

For all of the above and foregoing reasons, the Appellee respectfully moves this Court to enter an order affirming the trial court's order dismissing the charges against the Appellee.

DATED this 27th day of July, 2006.

PASCUA YAQUI PUBLIC DEFENDER

A handwritten signature in cursive script, reading "Nicholas A. Fontana", written over a horizontal line.

Nicholas A. Fontana
Chief Public Defendant
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that the original and five (5) copies of the Brief in Response were delivered
this date to:

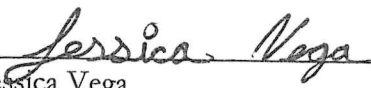
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 South Camino de Oeste
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and that one (1) copy of the Brief in Response was delivered this date to:

Micah Schmit
Chief Prosecutor
Office of the Prosecutor of the Pascua Yaqui Tribe
7474 South Camino de Oeste
Tucson, AZ 85757

DATED this _____ day of July, 2006.

PASCUA YAQUI PUBLIC DEFENDER



Jessica Vega
Legal Secretary

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

FILED JUN 23 2011

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

JUN 23 PM 2:13

PASCUA YAQUI TRIBE,)
)
 Plaintiff/Appellant,)
)
 vs.)
)
 Soto, Alma,)
)
 Defendant/Appellee,)
 _____)

Trial Court case number:
 Appeals Court case number:

BOOKET NO. CA-06-011
CLERK [Signature]

ON APPEAL FROM THE PASCUA YAQUI TRIBAL COURT

APPELLANT'S OPENING BRIEF

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STATEMENT OF CASE

This is an appeal from an order dismissing a criminal case. The case was dismissed with prejudice by order of the trial court dated April 4, 2006. A notice of appeal was timely filed on April 7, 2006. Appendix A. This court has jurisdiction to hear the appeal pursuant to 3 PYTC § 2-3.

STATEMENT OF PROCEEDINGS AND FACTS

Defendant/Appellee is Alma Soto, a member of the Pascua Yaqui Indian Tribe. Ms. Soto was arrested on January 27, 2006 for crimes committed on the Pascua Yaqui Indian Reservation. She was charged on January 28, 2006 with five criminal counts. An initial hearing was held on January 28, 2006. The arraignment was held on February 7, 2006.

The Public Defender's Office entered its appearance on March 10, 2006 and filed a request for disclosure. The pre-trial conference was initially scheduled for March 13, 2006. At that hearing, Defendant asked that the hearing be continued and that Tribe be ordered to provide disclosure. The court continued the pre-trial hearing to April 4, 2006 and ordered the Tribe to provide disclosure by March 17, 2006. The Tribe provided police reports to Defendant's counsel on March 13, 2006. The Tribe's full disclosure was filed March 14, 2006, within a day of defense counsel's request.

Defendant filed a motion to dismiss on March 23, 2006 alleging failure to comply with disclosure rules by the Tribe. A hearing on the motion was held on April 4, 2006. The trial court dismissed the case with prejudice by order dated April 4, 2006.

DISPOSITION

The trial court dismissed the case with prejudice by order dated April 4, 2006.

STATEMENT OF ISSUES

1. Does the Tribe have an *affirmative* duty to deliver to a defendant disclosure materials absent a request by the defendant? No.
2. If there is a duty and the Tribe did not meet its duty, was the appropriate remedy a dismissal with prejudice? No.

ARGUMENT

- A. In its dismissal order, the trial court created a standard of disclosure which does not exist in the tribal code or the tribal constitution.

On page 2 of the April 4, 2006 order, the court stated “the prosecutor has the affirmative duty to provide the defendant all information within the possession or control of the prosecutor.” Later in the order, on page 3, the court stated that the tribal code “mandates that the prosecutor provide such disclosure information to a defendant.” However, nowhere in the tribal code is there mention of an affirmative duty, or a mandate. And it is the Tribe’s position that there is no such duty or mandate, either explicit or implied.

(1) Pascua Yaqui Tribal Code.

9 PYTC § 2-500 is the code section that addresses disclosure in criminal cases. Appendix B. The relevant portion of that section states “the prosecutor shall make available to the defendant for examination and reproduction the following material and information.” There are no Pascua Yaqui Appellate cases which address this code section. Therefore, we can do two things. First, examine the language of the code to determine whether an unambiguous intent can be discerned. And second, look to other jurisdictions for examples of how disclosure issues are handled, particularly those jurisdictions whose laws contain language similar to the Pascua Yaqui Tribal Code.

Let us first parse out the language of the code. “[T]he prosecutor shall” clearly indicates that the Tribe must do something. But what must it do? “[M]ake available to the defendant” and “for examination and reproduction” are both passive possessory duties only. Merriam-Webster defines examination as “the act or process of inspecting closely.” The next word to look at is “reproduction.” Merriam-Webster defines reproduction as “something reproduced; copy” and reproduced is defined as “to make a representation (as an image or copy) of.” Nothing in these definitions indicates an active duty to deliver materials to the defendant. Instead, the definitions unambiguously indicate a passive duty to have or possess for “inspection” and (if desired) to reproduce or copy. If the spirit of the obligation is to allow reproduction when desired, then logically it cannot mean an obligation even greater than that, i.e. to actually deliver the item.

(2) Pascua Yaqui Constitution.

Article I of the Constitution of the Pascua Yaqui Tribe is the Tribe’s bill of rights. Appendix C. Section 1(h) of the bill of rights states that the Tribe shall not “deprive any person of liberty or property without due process.” Due process is not defined in the Constitution or the Tribal Code, and as mentioned above, there are no Tribal appellate cases addressing due process in the context of disclosure in criminal cases. But in other jurisdictions, due process is subject to reasonableness and/or lack of bad faith from the inquiring party.

(3) Federal law.

The trial court, in its order, and Defendant, in her motion filed March 26, 2006, makes frequent reference to the U.S. Supreme Court case of *Brady v. Maryland*.¹ The trial court starts out its discussion of *Brady* by first indicating that the U.S. Constitution does not apply to tribes,² and then discusses for half a page the requirements of *Brady*. The Tribe's position is that *Brady* does not apply. But even if it did, it should be noted that *Brady* and subsequent cases that have interpreted it, do not impose any affirmative standard of disclosure upon the government.

The standard of disclosure required under federal law can easily be determined by looking at the Federal Rules of Criminal Procedure, Rule 16. Rule 16 imposes a duty upon the government to disclose, but only "upon a defendant's request." This language is used throughout Rule 16.

(4) The Indian Civil Rights Act.

The trial court and Defendant also make reference to the Indian Civil Rights Act of 1968 (IRCA)³ and appear to be linking due process as delineated in *Brady* to the standard ordered by the trial court judge. This is wrong because due process in the context of the IRCA is not the same as the due process in the U.S. Constitution.

When addressing the ICRA, federal courts have been quite consistent in their views that due process under the ICRA is not the same as due process under the constitution. The Ninth Circuit Court of Appeals stated that "courts have been careful to construe the terms "due process" and "equal protection" as used in the Indian Bill of Rights with due regard for the historical, governmental and cultural values of an Indian tribe. As a result, these terms are not always given the same meaning as they have come to represent under the United States Constitution." *Tom v. Sutton*.⁴ In discussing the IRCA, the Tenth Circuit stated that "[t]he Constitution applies to Indian nations only to the extent it expressly binds them or is made binding on them by treaty or Act of Congress." *Groundhog v. Keeler*.⁵ Other federal courts have ruled similarly.⁶

(5) Arizona law.

At the time that 9 PYTC § 2-500 was drafted, the language in Rule 15.1 of the Arizona Rules of Criminal Procedure was almost identical to that of § 2-500. (The Arizona Rules were amended in 2003). Indeed, the language "the prosecutor shall make

¹ 373 U.S. 83 (1963).

² Citing *Talton v. Mays*, 163 U.S. 376 (1896).

³ 25 U.S.C. §§ 1301-1303.

⁴ C.A.9 (Wash.) 1976, 533 F.2d 1101, 1105.

⁵ C.A.10 (Okla.) 1971, 442 F.2d 674, 678.

⁶ *UNC Resources, Inc. v. Benally*, D.C.N.M.1981, 514 F.Supp. 358; *Stands Over Bull v. Bureau of Indian Affairs*, D.C.Mont.1977, 442 F.Supp. 360, 367, appeal dismissed 578 F.2d 799 (9th Cir.) 1978; *Janis v. Wilson*, D.C.S.D.1974, 385 F.Supp. 1143, remanded on other grounds 521 F.2d 724; *Lohnes v. Cloud*, D.C.N.D.1973, 366 F.Supp. 619.

available to the defendant for examination and reproduction the following material and information” is verbatim from Arizona’s Rule 15.1. Importantly, there are no Arizona cases which interpret a standard for disclosure like that ordered by the tribal court. As a result, it is the general practice in Arizona courts *not* to deliver disclosure materials to defendants, but merely to make them available at the prosecutor’s office.

(6) The law of other tribes.

A review of tribal codes reveals that there are four general categories of disclosure standards. First, there are codes which have no specific disclosure requirement. For example, the Yavapai Apache Nation of Fort McDowell Tribal Code and Colville Tribal Law and Order Code.

Second, there are codes which require limited automatic disclosure with additional disclosure being provided only upon request of the defendant. For example, the Tulalip Code requires the prosecutor to “disclose to the defendant the name of the person, if any, against whom the offense was committed if not disclosed in the complaint.”⁷ The Confederated Salish and Kootenai Tribes have a code provision with identical language.⁸

Third, and most common, are codes that require disclosure only upon request by the defendant. For example, the Rules of the Skokomish Tribal Court provide that “[u]pon request of the defendant, at or before trial, the tribe shall give the defendant” disclosure materials.⁹ Other tribes whose codes contain identical or similar language are the Winnebago,¹⁰ Shawnee,¹¹ Cheyenne-Arapaho,¹² Coos, Lower Umpqua and Siuslaw,¹³ Eastern Band of Cherokee¹⁴ and the Yankton Sioux.¹⁵

Finally, as an example of very limited disclosure obligations, the Blackfeet Tribal Code provides that “at the request of the defendant, the Court *may* order the Trial Prosecutor to permit the defendant to inspect and copy” disclosure materials (emphasis added).¹⁶

From these examples, it is apparent that there are a variety of ideas regarding what is appropriate disclosure. Even with that variety however, none of these codes have a requirement that disclosure materials be affirmatively or proactively delivered to defendants.

⁷ Tulalip Codes and Regulations, Ordinance 49, Law and Order Code § 2.8.4(1).

⁸ Confederated Salish and Kootenai Tribes (CSKT) Laws Codified § 2-2-804(1).

⁹ Rules of the Skokomish Tribal Court, Rule 3.01.087 (Criminal Rule 87).

¹⁰ Winnebago Tribal Court Rules of Criminal Procedure, Rule 1B-313(1).

¹¹ The Absentee Shawnee Tribe of Oklahoma, Rule 212(a).

¹² Cheyenne-Arapaho Tribes of Oklahoma Law and Order Code, Title II, Subpart C § 212(a).

¹³ Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians, Tribal Code § 3-3-13(a).

¹⁴ Code of the Eastern Band of Cherokee Indians, Chapter 15, Rule 7(f).

¹⁵ Yankton Sioux Tribal Rules of Criminal Procedure, Rule 13(A).

¹⁶ Blackfeet Tribal Law and Order Code Chapter 9, Rule 57.

B. Dismissal with prejudice was not the appropriate remedy.

After applying its own interpretation to the disclosure requirements of § 2-500, the trial court dismissed the case against Defendant with prejudice. That was an inappropriately harsh sanction.

(1) Sanctions under the Pascua Yaqui Tribal Code.

9 PYTC § 2-504 provides for sanctions for failure to comply with disclosure rules. Appendix D. The list of sanctions, though not exclusive, does not include dismissal. This indicates that the possibility of other sanctions should be considered before dismissal. The trial court did not do that.

The trial court mentioned that “the rules of disclosure and discovery are designed to prevent trials by ambush.” But in this case, there was no trial by ambush as there was not even a trial date set yet. If the trial court was indeed concerned about “trial by ambush,” many things could have been done to prevent that. A trial date with plenty of time for Defendant to prepare could have been set, evidence could have been excluded, or the case could have been dismissed without prejudice. The trial court didn’t even consider other remedies.

(2) There was no prejudice to Defendant.

At several points in her motion, Defendant asserts that the Tribe’s “failure” to disclose prejudiced her ability to present a defense. The trial court also indicated that Defendant’s rights were prejudiced. The only example of prejudice that either Defendant or the trial court gave was that Defendant was not able to timely comply with her own requirements to disclose. However, Defendant’s disclosure was not raised by the Tribe or by the trial court. It is therefore very difficult to see any prejudice.

(3) There was no bad faith on the part of the Tribe.

The Tribe acted in good faith. It is the Tribe’s practice to include a notice of disclosure rights at the end of each criminal complaint, and the Tribe did that in this case. When requested by Defendant through her counsel, and ordered to do so by the trial court, the Tribe made a full and complete disclosure and delivered the disclosure to Defendant. There is no claim by Defendant that a request for disclosure was made prior to March 13, 2006. There is no claim by Defendant that disclosure materials were deliberately withheld by the Tribe. And there is no claim by Defendant that the disclosure materials that were provided were incomplete.

(4) Sanctions under the Arizona Rules of Criminal Procedure.

Like its disclosure rule, Arizona’s sanction rule was amended in 2003; however, the previous rule contained a list of sanctions identical to that of the Pascua Yaqui Tribal

Code.¹⁷ Therefore, it may be helpful to examine Arizona cases that have addressed the issue of sanctions during that period.

There are, in fact, no cases involving a dismissal sanction when the government failed to comply with disclosure requirements. In fact, Arizona courts often do not even suppress evidence that has not been timely disclosed. For example, the Arizona Supreme Court has held that a prosecution witness disclosed two days before trial could testify. *State v. Zuck*.¹⁸ More generally, the Court has held that even where a sanction for failure to timely disclose material evidence is warranted, "it should have minimal effect on the evidence and the merits of case" as "[p]recluding evidence is rarely an appropriate sanction." *State v. Towery*.¹⁹ These interpretations truly further the ends of justice. The tribal court's does not.

CONCLUSION

The trial court has created a standard for disclosure which is not supported by the tribal code or constitution, nor consistent with state, federal, or other tribal jurisdictions. Even if there was a duty for the Tribe to disclose, the penalty imposed by the Trial Court was too harsh. Without even a trial date setting, there could not rationally be any prejudice. The case before should not have been dismissed with prejudice.

The trial court's decision should be reversed and the case remanded.

RESPECTFULLY SUBMITTED this 23^d day of June, 2006.

MICAH SCHMIT
CHIEF PROSECUTOR



YANCY A. JENCOK
Deputy Prosecutor
Counsel for Appellant

Original of foregoing w/ appendixes, and 5 copies delivered to:
Clerk, Pascua Yaqui Tribe Court of Appeals

Copy mailed/delivered to:
Pascua Yaqui Public Defender

On June 23rd, 2006 by: x 

¹⁷ Arizona Rules of Criminal Procedure, Rule 15.7(a).

¹⁸ 658 P.2d 162 (Ariz. 1982).

¹⁹ 920 P.2d 290, 308 (Ariz. 1996), *certiorari* denied, 519 U.S. 1128, denial of post-conviction relief affirmed, 64 P.3d 828, reconsideration denied, *certiorari* dismissed, 539 U.S. 986.

Appendixes

Appendix A: Notice of Appeal

Appendix B: Pascua Yaqui Tribal Code, Title 9, Chapter 2, Section 500 -

Appendix C: Pascua Yaqui Tribe Constitution, Article I, Section 1(h)

Appendix D: Pascua Yaqui Tribal Code, Title 9, Chapter 2, Section 504

Appendix A

Notice of Appeal

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DOCKET NO. CA-06-010
CLERK [Signature]

1 PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR
2 7474 S. Camino de Oeste
Tucson, Arizona 85757
3 (520) 879-6251

4 Micah Schmit
Chief Prosecutor

5 **IN THE PASCUA YAQUI TRIBE COURT OF APPEALS**
6 **IN AND FOR THE PASCUA YAQUI RESERVATION, ARIZONA**

8 PASCUA YAQUI TRIBE,
Appellant,
9
vs.
10 SOTO, Alma
11 Defendant.

NO.
(Tribal Court No. CR-06-116)

NOTICE OF APPEAL
Oral argument requested

12
13 Notice is hereby given that the Pascua Yaqui Tribe appeals to
14 our Court of Appeals from the judgment entered in this action by
15 the Pascua Yaqui Tribal Court on April 4, 2006, attached. The
16 Court dismissed this case, with prejudice, for alleged tardy
17 disclosure under PYT Rules of Criminal Procedure, Rules 500, et.
18 seq. The Tribe contends that the interpretation of governmental
19 obligations and/or the ordered sanction is erroneous and/or overly
20 harsh, thereby being contrary to serving the interests of justice.

21 The Pascua Yaqui Tribe requests oral argument and a three-
22 Justice appellate proceeding.

23
24 ///

25
26 ///



1
2 Respectfully submitted this 7th day of April, 2006.

3 OFFICE OF THE PROSECUTOR
4 PASCUA YAQUI TRIBE

5 
6 _____
7 Micah Schmit
8 Chief Prosecutor

9 Original delivered/mailed
10 This date to:

11 Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

12 Copies delivered/mailed to:

13 Defendant Alma Soto, c/o June Harris,
14 PYT Public Defender's Office

15 Pascua Yaqui Tribal Court

16 Pilar Thomas,
17 Office of the PYT Attorney General

18 By: 

Appendix B

Pascua Yaqui Tribal Code
Title 9, Chapter 2, Section 500

and warrant be served upon the person. Willful evasion of service of a subpoena shall be considered failure to obey a subpoena.

(B) Upon the arrest of the person made the subject of the order to show cause, that person shall be given the opportunity to justify to the court his or her failure to obey the subpoena. In the event that the court determines that the failure to obey the subpoena was unjustified, the court may find the person in contempt of court and sentence him or her pursuant to the tribal code.

ARTICLE FIVE - DISCOVERY

Rule 500 Disclosure by Tribe.

(A) Matters relating to guilty, innocence or punishment. No later than ten days after the arraignment, the prosecutor shall make available to the defendant for examination and reproduction the following material and information within the prosecutor's possession or control:

- (1) The names and address of all persons whom the prosecutor will call as witnesses in the case-in-chief together with their relevant written or recorded statements;
- (2) All statements of the defendant and of any person who will be tried with the defendant;
- (3) The names and addresses of experts who have personally examined a defendant or any evidence in that particular case, together with the results of physical examinations and of scientific tests, experiments or comparisons, including all written reports or statements made by them in connection with the particular case;
- (4) A list of all papers, documents, photographs or tangible objects which the prosecutor will use at trial or which were obtained from or purportedly belong to the defendant;
- (5) A list of all prior convictions of the defendant which the prosecutor will use to prove motive, intent, or knowledge or otherwise use at trial;
- (6) All material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce his or her punishment therefore, including all prior felony convictions of witnesses whom the prosecutor expects to call at trial.

(B) Possible collateral issue. At the same time the prosecutor shall inform the defendant and make available to the defendant for examination and reproduction any written or recorded material or information within his possession or control regarding:

- (1) Whether there has been any electronic surveillance of any conversations to which the accused was a party or of his or her business or residence;

Appendix C

Pascua Yaqui Tribe Constitution Article I, Section 1(h)

offense any penalty or punishment greater than imprisonment for a term of one (1) year or a fine of \$5,000 or both.

- h. Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.
- i. Pass any bill of attainder or *ex post facto* law.
- j. Deny to any person accused of any offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six (6) persons.

Section 2. The privilege of the writ of habeas corpus shall be available to any person in a court of the United States to test the legality of their detention by order of the Pascua Yaqui Tribe.

ARTICLE II – JURISDICTION

The jurisdiction of the Pascua Yaqui Tribe and of the Pascua Yaqui Tribal Council shall extend to all lands within the boundaries of the Pascua Yaqui Indian Reservation, established pursuant to the Act of September 18, 1978 (Public Law 95-375; 92 Stat. 712). Such jurisdiction shall also extend to such other lands as may in the future be added thereto, and to all land which from time to time may be owned by or held in trust for the Pascua Yaqui Tribe provided the state, county, city or other political subdivision where such land is located has retroceded to the United States Federal Government all civil and criminal jurisdiction. The jurisdiction of the Pascua Yaqui Tribe shall include also that jurisdiction granted to Indian tribes pursuant to the Indian Child Welfare Act of 1978 (Public Law 95-608; 92 Stat 3069).

ARTICLE III - MEMBERSHIP IN THE PASCUA YAQUI TRIBE

Section 1. The membership of the Pascua Yaqui Indian Tribe shall consist of the following:

- a. The base membership of the Pascua Yaqui Tribe shall be all eligible persons listed on the base membership roll of the Pascua Yaqui Tribe dated September 18, 1980, which was approved by the Phoenix Area Director on December 1, 1983, and published in the Federal Register on May 17, 1984. Corrections to the base roll may be made at any time by the tribal council subject to the approval of the Secretary of the Interior; provided that the names of additional persons may not be added to the base membership roll; and

Appendix D

Pascua Yaqui Tribal Code
Title 9, Chapter 2, Section 504

promptly notify all other parties of the existence of such additional material, and make an appropriate disclosure.

Rule 504 Sanctions.

If at any time during the course of the proceeding, it is brought to the attention of the court that a party has failed to comply with any provisions of these discovery rules or any order issued pursuant thereto, the court may impose any sanction which it finds just under the circumstances, including, but not limited to:

- (1) Ordering disclosure of the information not previously disclosed;
- (2) Granting a continuance;
- (3) Holding a witness, party, or counsel in contempt of court;
- (4) Precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; and
- (5) Declaring a mistrial when necessary to prevent a miscarriage of justice.

ARTICLE SIX - TRIAL

Rule 600 Trial Procedure; Evidence.

(A) The time and place of court sessions, and all other details of judicial procedure not determined by these rules shall be set out in rules of court; provided, however, that no rule of court shall abridge any right granted or protected by these rules.

(B) Whenever due process or the court requires, the Federal Rules of Evidence shall be adopted in any trial proceeding or evidentiary hearing, unless otherwise found by the court to have been voluntarily and intelligently waived by the defendant.

Rule 601 Jury Trial.

(A) Any person accused of a crime for which imprisonment is specified in the tribal code as a possible penalty shall be granted a jury trial, upon his or her request made at the time of arraignment, or at least 30 days before the date set for trial, whichever is later.

(B) In any case in which the defendant is charged with a crime for which according to the tribal code, the judge may, if the defendant is found guilty, sentence the defendant to either imprisonment or a fine, or both, the judge, may with the consent of both the prosecutor and the defendant, find at the time of arraignment that under the particular facts of the case, as charged in the complaint, that under no circumstance will the defendant be sentenced to imprisonment. In such cases, the judge may announce such finding and try the defendant without a jury.

1 Pascua Yaqui Public Defender
7474 S. Camino de Oeste
2 Tucson, Arizona 85746

3 Nicholas A. Fontana, Esq.
State Bar No. 014429
4 Attorney for Appellee

PASCUA YAQUI INDIAN CO.
TRIBE DATE 4/23/06

06 MAY 23 AM 9:24

DOCKET NO. CA 06-010

CLERK

5
6 IN THE PASCUA YAQUI COURT OF APPEALS
7 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

8 PASCUA YAQUI TRIBE,

9 Appellant,

10 vs.

11 SOTO, ALMA,

12 Appellee.

) Case No.

) Tribal Court No. CR-06-116

) **NOTICE OF APPEARANCE**

13
14
15 Pursuant to Title 1, Pascua Yaqui Judicial Titles and Codes, § 1.26, the Pascua Yaqui Public
16 Defender, through undersigned counsel respectfully enters its appearance in this case on behalf of Appellee
17 Alma Soto.

18 DATED this 23rd day of May, 2006.

19 PASCUA YAQUI PUBLIC DEFENDER

20 

21 Nicholas A. Fontana
22 Chief Public Defender

23 ORIGINAL hand-delivered this date
24 PYT Court of Appeals: J

25 COPY of the foregoing hand-delivered this date
26 PY Prosecutor by: [Signature]

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MEDICAL
06 APR -7 PM 1:40
DOCKET NO. CA-06-009
CLERK [Signature]

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR
7474 S. Camino de Oeste
Tucson, Arizona 85757
(520) 879-6251

Micah Schmit
Chief Prosecutor

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI RESERVATION, ARIZONA

PASCUA YAQUI TRIBE,
Appellant,

vs.

SOTO, Alma
Defendant.

NO.
(Tribal Court No. CR-06-116)

NOTICE OF APPEAL
Oral argument requested

Notice is hereby given that the Pascua Yaqui Tribe appeals to our Court of Appeals from the judgment entered in this action by the Pascua Yaqui Tribal Court on April 4, 2006, attached. The Court dismissed this case, with prejudice, for alleged tardy disclosure under PYT Rules of Criminal Procedure, Rules 500, et. seq. The Tribe contends that the interpretation of governmental obligations and/or the ordered sanction is erroneous and/or overly harsh, thereby being contrary to serving the interests of justice.

The Pascua Yaqui Tribe requests oral argument and a three-Justice appellate proceeding.

///

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1
2 **Respectfully submitted this 7th day of April, 2006.**

3 OFFICE OF THE PROSECUTOR
4 PASCUA YAQUI TRIBE

5 
6 _____
7 Micah Schmit
8 Chief Prosecutor

9 Original delivered/mailed
10 This **date** to:

11 Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

12 Copies delivered/mailed to:

13 Defendant Alma Soto, c/o June Harris,
14 PYT Public Defender's Office

15 Pascua Yaqui Tribal Court

16 Pilar Thomas,
17 Office of the PYT Attorney General

18 By: 

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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,)
PLAINTIFF,)
vs.)
ALMA SOTO,)
DEFENDANT.)

Case No. CR-06-116

ORDER OF DISMISSAL
AND EXONERATION OF BOND

The defendant, Alma Soto, appeared with her counsel, M. June Harris, as did Allen Osburn for the Tribe, on April 4, 2006 for a pre-trial conference. The court considered the defendant's motion for dismissal based on the Tribe's failure to disclose.

The court, after hearing the motion and argument, reviewing the Pascua Yaqui Criminal Code and Rules of Procedure, and reviewing the court's file and records, finds that the defendant's motion to dismiss should be granted, for good cause shown.

The Pascua Yaqui Tribal Code provides in pertinent part, under the Rules of Criminal Procedure, Chapter 5, Section 5.1, entitled "Discovery", as follows:

Rule 5.1 Disclosure by Tribe

- A. Matters relating to guilty,(sic) innocence or punishment. No later that ten (10) days after the arraignment, the prosecutor shall make available to the defendant for examination and reproduction the following materials and information within the prosecutor's possession or control:
 1. The names and addresses of all persons whom the prosecutor will call as witnesses in the case in chief together with their relevant written or recorded statements;
 2. All statements of the defendant and of any person who will be tried with the defendant;
 3. The names and addresses of experts who have personally examined a defendant or any evidence in that particular case, together with the results of physical examinations and of scientific tests, experiments or comparisons, including written reports or statements made by them in connection with eth particular case;
 4. A list of all papers, documents, photographs or tangible objects which the prosecutor will use at trial or which were obtained from or purportedly belong to the defendant;
 5. A list of all prior convictions of the defendant which the prosecutor will use to prove motive, intent, or knowledge or otherwise use at trial;
 6. All materials or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which tend to reduce his or her

PASCUA YAQUI TRIBAL COURT
APR 5 2006
PROSECUTOR

1 punishment therefor, including all prior felony convictions of witnesses
2 whom the prosecutor expects to call. PYTC, Title 10, Ch. 5, Sec. 5.1.

3 The intent of the disclosure law is clear, that the prosecutor has the affirmative duty to provide
4 the defendant all information within the possession or control of the prosecutor to reasonably
5 apprise the defendant of the charges filed against him or her, so the defendant may interview
6 witnesses, confront them, cross examine them, and inspect evidence which may be used against
7 a defendant at trial. Although the U.S. Constitution does not apply to tribes, see *Talton v. Mays*,
8 163 U.S. 376 (1896), federal laws dictate that Tribal courts and Tribes in criminal matters must
9 provide constitutional-like protections to defendants accused of crimes in Indian country. The
10 Pascua Yaqui Code follows the constitutional-like standards of the Indian Civil Rights Act, 25
11 U.S. § 1302, et seq., which are federally imposed standards to ensure the rights of defendants to
12 due process guarantees are afforded them in Tribal courts. One of the fundamental rights of
13 due process is the defendant's right to disclosure of all material evidence that may be used
14 against him or her and to disclose all witnesses who may testify against him or her in a criminal
15 prosecution by the Tribe.

16 The U.S Supreme Court in a landmark decision of *Brady v. Maryland.*, 373 U.S. 83
17 (1963), provided guidance for all U.S. courts that exculpatory information, material to a
18 defendant's guilt or punishment, which the government knew about but failed to disclose to the
19 defendant in time for trial constitutes a denial of a defendant's fundamental right to due process
20 if the government has been found to suppress such evidence. Due Process rights must be
21 afforded defendants so that they may adequately defend their rights. The rules of disclosure and
22 discovery are designed to prevent trials by ambush, because courts in their decisions affecting
23 persons' liberties in criminal cases should be able to decide cases based on what facts are
24 revealed rather than on what facts are concealed.

25 In this case, the defendant's arraignment date was February 7, 2006, which would have
26 required the Tribe to disclose no later than February 17, 2006. The defendant was not
27 represented by counsel at the time of her arraignment, and her counsel, M. June Harris entered
28 an appearance on March 13, 2006, and on the same date she requested the court's order to
compel the Tribe to disclose. The court issued its order for disclosure and the Tribe produced
its Response, Notice to Witness and Supplemental Disclosure on March 14, 2006, or 34 days

1 after the arraignment, and 24 days after the disclosure date on which the Tribe should have been
2 required to produce documents to the defendant, as mandated by the Pascua Yaqui Rules of
3 Criminal Procedure Rule 500(A).

4 The standard practice of the Pascua Yaqui Tribal Court has been to allow the
5 prosecution and defense counsel to meet, confer, and produce all information to each other so
6 that all parties have a clear understanding of what evidence and which witnesses are anticipated
7 for trial. **PYTC, Title 10, Ch. 5, Sec. 5.1 mandates that the prosecutor provide such
8 disclosure information to a defendant 10 days after the date of the arraignment.**

9 When the prosecutor discloses information to the defendant, the practice of the court has
10 been for the parties to file their written responses to the disclosure request. If, for instance, the
11 prosecution may feel the requested information by defendant is privileged, or otherwise not
12 subject to disclosure, the prosecutor should provide a written objection or explanation as to why
13 the prosecutor cannot or should not produce such privileged information to determine whether a
14 court hearing is necessary. In such cases, where opinions of parties differ, the judge may set the
15 matter for discovery hearing and be the arbiter to determine whether a protective order or other
16 means of protecting such privileged information should be issued and whether the information
17 requested should or should not be disclosed. The court practice is to assure that the attorneys
18 and parties follow the rules of procedure and disclosure without close supervision or court
19 intervention, unless a legitimate dispute arises in requests for discovery of evidence which one
20 side believes is not subject to such disclosure. By submitting such a written response to the
21 defendant's request for disclosure, where disclosure is challenged by the prosecutor's office, the
22 prosecutor's office would show its good faith efforts to comply with Pascua Yaqui Chapter 5
23 rules of discovery and provide written proof that it has made all due diligence in its compliance
24 to produce all information under its possession or control.

25 The prosecutor in this case failed to file any motions or notices to the court as to why it
26 could not fulfill its statutory duty to disclose by February 17, 2006, and it did nothing to
27 produce the information to the defendant until her counsel made a formal request for disclosure.
28 PYTC section 5.5 provides in pertinent part:

Sanctions

If at any time during the course of the proceeding, it is brought to the attention

1 of the court that a party has failed to comply with the provisions of these discovery rules
2 or any order issued pursuant thereto, the court may impose any sanction which it finds
3 just under the circumstances, **including but not limited to:** (emphasis added)

- 4 1. Ordering disclosure of the information not previously disclosed;
- 5 2. Granting a continuance;
- 6 3. Holding a witness, party, or counsel in contempt of court;
- 7 4. Precluding a party from calling a witness, offering evidence, or raising a defense
8 not disclosed; and,
- 9 5. Declaring a mistrial when necessary to prevent a miscarriage of justice.

10 PYTC, Title 10, Ch.5, Sec. 5.1.

11 In this case, the defendant's counsel requested a motion to order the Tribe to disclose.
12 Although the Tribe should have provided the disclosure materials on February 17, 2006, the
13 court ordered the Tribe to produce, pursuant to section 1 of the law above. Defendant has in
14 fact asserted her right to the disclosure. The Tribe's argument that there is no harm to the
15 defendant or that her motion to dismiss is not timely has no merit, given the fact the Tribe failed
16 to meet its statutory duty and then produced documents 34 days after the defendant's
17 arraignment. The defendant had no affirmative duty to compel the Tribe to produce disclosure
18 for which she was entitled, as a matter of law. It was the Tribe's statutory duty to disclose, not
19 the defendant's duty to request the documents. The Tribe has violated the dictates of the statute
20 to disclose, and through its omission to act, has prevented the defendant from adequately
21 preparing for her defense and for her trial. Similarly, the late production by the Tribe impaired
22 the defendant's ability to file her disclosure timely. The defendant's duty under the statute is
23 that after the Tribe produces its documents 10 days after the arraignment, then the defendant
24 has 10 days to produce.

25 If the court finds that a party has violated the disclosure statute listed above, it may
26 sanction a party for failure to comply with the mandatory release of information. The list of
27 sanctions above is not exclusive, but rather, the rule allows the court some discretion in what
28 other sanctions not specifically enumerated in the five types of sanctions above it may impose
on a party who violates the rule. The court, in exercising its contempt authority, should provide
appropriate sanctions in cases where a party's actions have adversely affected the
administration of justice, and such contempt authority should be exercised judiciously. The
court should prevent the introduction of witness or offering evidence for the matters not


1 disclosed in a timely fashion to the defendant, and for violation of the disclosure rules, as
2 supported by rule 5.5. of the code allowing the court to do so.

3 Based on the discovery abuses in this case, by the omission of the prosecutor to disclose
4 in a timely fashion mandated by the statute, the court should grant the defendant's request for
5 dismissal with prejudice based on discovery abuses for the Tribe's omission to act in this
6 criminal prosecution.

7 **IT IS ORDERED** that this case is dismissed, based on the prosecution's failure to
8 follow the disclosure rules established by the Pascua Yaqui Tribal Code Rules of Criminal
9 Procedure Chapter 5.1 ("Disclosure by Tribe"), and based on prejudice against the defendant,
10 the court should dismiss the matter with prejudice to re-filing.

11 **IT IS FURTHER ORDERED** that the \$750.00 bond posted on January 29, 2006 shall
12 be exonerated and returned to the surety, Yvonne Diaz.

13 SO ORDERED THIS 4th DAY OF APRIL, 2006.

14 
15 Associate Judge, Pascua Yaqui Tribal Court

16 Date 04-05-06
17 cc: X Tribe X Defendant X Counsel _____ Other
18 Clerk _____